

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

IN THE MATTER OF THE WINDING DOWN OF:

THE NEW HAMPSHIRE MEDICAL MALPRACTICE
JOINT UNDERWRITING ASSOCIATION

No. 217-2015-CV-00347

**AFFIDAVIT OF PETER A. BENGELSDORF, SPECIAL DEPUTY
COMMISSIONER, IN SUPPORT OF APPROVAL OF INTERIM
DISTRIBUTION, INTERPLEADER AND RELATED DISCHARGE**

I, Peter A. Bengelsdorf, depose and say:

1. I am the Special Deputy Commissioner of the New Hampshire Medical Malpractice Joint Underwriting Association (“NHMMJUA”) appointed by Roger A. Seigny, Insurance Commissioner for the State of New Hampshire, as Receiver (“Receiver”) of the NHMMJUA. I submit this affidavit in support of the Receiver’s Amended Motion for Approval of Interim Distribution, Interpleader and Related Discharge Pursuant to RSA 404-C:17 (the “Motion”). In the Motion, the Receiver moves, with the assent of certain policyholders appearing in this proceeding, for an order approving the interim distribution and interpleader of sixty million dollars (\$60,000,000) from the NHMMJUA estate and discharge of the Receiver with respect to those funds pursuant to RSA 404-C:17, III. The facts and information set forth in this affidavit are either within my own knowledge gained through my involvement with this matter, in which case I confirm that they are true, or are based on information provided to me by others, in which case they are true to the best of my knowledge, information, and belief.

2. The Receiver filed the original Receiver's Motion for Approval of Interim Distribution, Interpleader and Related Discharge Pursuant to RSA 404-C:17 on February 21, 2017. On April 3, 2017, the Court deferred action pending briefing on certain issues. The issues were ultimately certified to the New Hampshire Supreme Court, and on March 13, 2018, the Supreme Court issued an Order answering the certified questions and remanding to the Court. The Receiver now files this amended motion in light of the Order and the time since the original motion. The amended motion is essentially the same as the original motion except that it addresses some intervening events and increases the amount of the proposed interim distribution and interpleader from \$50 million to \$60 million.

3. The Order of Rehabilitation issued on July 22, 2015 appointed the Receiver to wind down the business of the NHMMJUA in accordance with RSA 404-C:15 -:17 and RSA 402-C. The Receiver has been winding down the NHMMJUA's business as reported in the Receiver's monthly status reports. Most significantly, the Receiver entered an Assumption Agreement with The Medical Protective Company ("MedPro") providing for MedPro's assumption of NHMMJUA coverage-related obligations in accordance with RSA 404-C:17, III. The Court approved the Assumption Agreement, as amended, on August 5, 2016, and the transaction closed on August 25, 2016.

4. The Receiver has paid the price called for by the Assumption Agreement to MedPro. The Receiver has also paid the ongoing administrative and operational expenses of the NHMMJUA and the expenses of the receivership on an ongoing basis as set forth in the monthly Receiver's reports and financial statements.

5. The Receiver continues to wind down the NHMMJUA. In particular, the Receiver is working to resolve tax issues. The Receiver worked with Leone, McDonnell &

Roberts (“Leone”), the NHMMJUA’s accountants, to prepare final tax filings for the NHMMJUA based on the September 30, 2016 financial statements. The Receiver filed the final federal and state returns on February 21, 2017. The Receiver also filed a federal Form 4810 “Request for Prompt Assessment” to trigger an 18-month period for the United States Internal Revenue Service (“IRS”) to act on open tax years and made a similar request for action to the New Hampshire Department of Revenue Administration (“DRA”). On May 26, 2017, the IRS notified the Receiver that the closing date for the tax year 2013 would be September 23, 2017, and the closing date for the 2014 and 2015 tax years and the 2016 stub year will be September 2, 2018. The Receiver did not receive any IRS tax due notices for the 2013 tax year, so that year is now closed. As to state taxes, the Receiver and the DRA executed an Audit Agreement resolving all state tax issues for open tax years in September 2017.

6. In the Assumption Agreement, the Receiver agreed to indemnify MedPro for any breach of the Receiver’s representations and for any claims asserted against MedPro arising from the Excluded Claims. The Assumption Agreement provided that the indemnities would terminate on the first anniversary of the closing (which was on August 25, 2016). The one-year indemnity period passed without any claims for indemnity being asserted by MedPro.

7. As noted in recent reports, the Receiver considered issues concerning the treatment of the Stabilization Reserve Fund (“SRF”). The Receiver concluded, based upon the regulations in effect when the surcharges that funded the SRF were collected and subsequently, that the NHMMJUA is obligated to return the approximately \$3.2 million remaining in the SRF to providers that paid surcharges. Accordingly, on March 16, 2018, the Receiver filed a Motion for Approval of Return of Stabilization Reserve Fund Excess to Health Care Providers (“SRF Motion”). As described in the Receiver’s reports, the Receiver is separately accounting for the

remaining SRF funds. The Court granted the SRF Motion and issued an Order Approving Return of Stabilization Reserve Fund Excess to Health Care Providers (“SRF Order”) on March 28, 2018. The Receiver has begun the process for returning SRF funds set forth in the SRF Order. Under the Order, any SRF amounts not returned to health care providers are to be turned over to the Abandoned Property Division of the New Hampshire Treasury one year from the date of that order.

8. Given the SRF return process and remaining potential tax issues, it appears likely that the NHMMJUA receivership will stay open for approximately another year.

9. In the circumstances, and in the interest of facilitating payment to NHMMJUA policyholders from the interpleader proceeding, the Receiver has considered whether it would be possible to make an interim distribution and interpleader of a sum while leaving an appropriate amount in the NHMMJUA estate to address expenses and other obligations of the NHMMJUA estate. The NHMMJUA’s net assets (assets after deduction of the hardship fund, the SRF, and a small amount of incurred but unpaid expenses) as of March 31, 2018 totaled approximately \$85.5 million.

10. In the Receiver’s judgment, retaining \$25 million in net assets in the NHMMJUA estate is sufficient to address the remaining costs and obligations of the NHMMJUA in receivership, including the administrative and operational expenses of the NHMMJUA, the expenses of the receivership, the remaining tax obligations, if any, of the NHMMJUA, and to provide a reasonable reserve for unknown and unexpected obligations of the NHMMJUA.

11. The Receiver has accordingly concluded that there are sufficient NHMMJUA assets to make an interim distribution of \$60 million to be interpleaded into the Tuttle Action in accordance with RSA 404-C:17, III. Such an interim distribution and interpleader will permit

the interpleader action to proceed with adjudication of NHMMJUA policyholder interests in the interpleaded funds and distribution as determined by the interpleader court. Funds that remain in the reserve after resolution of tax and other issues will be the subject of a subsequent interpleader of funds by the Receiver.

12. However, the distribution of part of the NHMMJUA estate will reduce the assets available if some unexpected issue arises. An order approving the interim distribution and interpleader accordingly should (a) discharge the Receiver as to the distributed funds; (b) provide that all obligations of and claims against the NHMMJUA and the Receiver are limited to the assets that remain in the NHMMJUA estate after the distribution; and (c) confirm that the Receiver and his agents and advisers shall have no liability on account of the interim distribution.

13. In accordance with the approach to the interpleader set out in RSA 404-C:17, IV, the Receiver should be discharged and dismissed from the interpleader proceeding once the interpleader court has accepted the interpleader.

14. The NHMMJUA estate funds are presently held by the Receiver in investment accounts managed by Deutsche Investment Management Americas Inc. (“Deutsche”) in accordance with investment guidelines approved by the Court. To facilitate the interpleader, the Receiver proposes that upon entry of an order of the interpleader court accepting the interpleader and approving investment of the interpleaded funds in Treasury bills and cash, the Receiver will transfer the interpleaded funds into an account under the control of the interpleader court to be managed by Deutsche under a separate contract and invested in Treasury bills and cash outside of the receivership.

15. The Receiver accordingly requests the Court’s approval to file a bill of interpleader pursuant to RSA 404-C:17 to interplead an interim distribution of \$60 million in the

Tuttle Action as described above. The proposed bill of interpleader, including a proposed form of acceptance order, is attached as Exhibit A to the Motion.

Signed under the penalties of perjury this 4 day of May, ²⁰¹⁸~~2017~~.

Peter A. Bengelsdorf
Peter A. Bengelsdorf
Special Deputy Commissioner of the New Hampshire
Medical Malpractice Joint Underwriting Association

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached and not the truthfulness, accuracy or validity of that document.

STATE OF CALIFORNIA
COUNTY OF VENTURA

On May ²⁰¹⁸~~4~~, ~~2017~~ before me, PETER A. BENGEISDORF, personally appeared Peter A. Bengelsdorf, Special Deputy Commissioner of the New Hampshire Medical Malpractice Joint Underwriting Association, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Claudia A. King
Signature of Notary Public

